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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF TENNESSEE,

PETITIONER,

v.

DONALD RAY MIDDLEBROOKS,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE STATE OF TENNESSEE AND BRIEF OF *AMICUS CURIAE*

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QUESTION PRESENTED

Does the Eighth Amendment prohibit the sentencer in a capital felony murder prosecution from considering as an aggravating circumstance the fact that the murder was committed in the perpetration of a felony?

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SUMMARY OF THE ARGUMENT

It is appropriate for the sentencer in a capital case to consider as an aggravating circumstance the fact that the murder occurred in the course of a felony murder even though felony murder is the factor which made the defendant death eligible.

In reaching the opposite conclusion, the majority opinion in Part III of *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), utilizes a formalistic, mechanical approach to the decision as to who receives the death penalty. However, the Eighth Amendment of the Constitution of the United States requires that a totality of the circumstances approach be used. The mechanical approach results in undue hostility to the felony murder rule and, in essence, forecloses the jury from considering the circumstances of the crime in all cases where a felony murder makes the defendant death eligible.

The mechanical approach, combined with the Tennessee Supreme Court's misunderstanding of the effect of the decisions of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987), adds an unnecessary, unwise, and unrequired additional step to appropriate Eighth Amendment analysis. The decisions in *Enmund v. Florida* and *Tison v. Arizona* have had the effect of narrowing the felony murder class sufficiently to satisfy the Eighth Amendment.

The sentence of death and the procedure by which it was chosen in this case met all the requirements of the Eighth Amendment and this Court's precedents. Therefore, the decision of the Supreme Court of Tennessee declaring that sentence to be void under the Eighth Amendment should be reversed.

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE STATE OF TENNESSEE AND BRIEF OF *AMICUS CURIAE*

Pursuant to Rule 37.4, Rules of the Supreme Court of the United States, *amicus curiae*, the Appellate Committee of the California District Attorney's Association, including the District Attorney of Los Angeles County, hereby moves for leave of this Court to file the attached *amicus curiae* brief in support of the State of Tennessee.

Amicus sought on three separate occasions to make contact with counsel for petitioner in this case for the purpose of obtaining consent pursuant to Rule 37.3, Rules of the Supreme Court of the United States. Counsel for petitioner has failed to respond to these inquiries. Similar efforts to contact respondent's counsel have led to similar results.

The California District Attorney's Association is an association of District Attorneys (and their deputies) who are authorized law officers of the State of California and of the counties they represent, including the County of Los Angeles, such counties being political subdivisions of the state. Thus, had the members of this association individually and separately sought to file this brief, consent would not have been required. See Rule 37.5, Rules of the Supreme Court of the United States.

In the event that this Court is not inclined to grant leave to file this brief on behalf of the Association, *amicus* respectfully requests that it be filed on behalf of the District Attorney of Los Angeles County alone under Rule 37.5.

Amicus believes that pursuant to Rule 37.1, Rules of the Supreme Court of the United States, the *amicus* brief offered herein brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties and will be of considerable help to the Court. The basic premise of petitioner's position in this matter, as revealed by its argument in the Petition for Writ of Certiorari, is that the holding in Part III of the Tennessee Supreme Court's opinion in *State v. Middlebrooks*, 840 S.W. 2d 317 (Tenn. 1992), conflicts with specific interpretations of the Eighth Amendment of the United States Constitution by this Court. Thus, petitioner argues that the interpretation of "narrowing" found in the opinion is not found in any opinion of this Court, relies in part on a misinterpretation of *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987), and *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988), and other decisions of this Court, and ignores additional statutory safeguards in the Tennessee death penalty

system. While *Amicus* agrees that the majority in Part III of the *Middlebrooks* opinion misinterprets the specific holdings of numerous precedents of this Court, *Amicus* argues that these misinterpretations are the result of a larger misunderstanding by the Tennessee majority in Part III of *Middlebrooks* as to the proper approach to making the death determinations under the Eighth Amendment of the United States Constitution. This misunderstanding attempts to substitute a formalistic, mechanical approach to the decision as to who receives the death penalty for the appropriate approach which requires a more inclusive weighing of the totality of the circumstances. This mechanical approach results in undue hostility to the felony murder rule and leads to the exclusion of a consideration of the underlying circumstances of the crime in those situations where felony murder is the basis for death eligibility. Thus, the *Amicus* position brings relevant arguments to the attention of this Court that would not otherwise be discussed. Hence, it is submitted that the brief of *Amicus* will be helpful to this Court.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by an association consisting of the District Attorneys of the State of California and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Los Angeles County. Upon review of the instant matter - which raises the issue of the use of felony murder as an aggravating circumstance by the sentencer in capital proceedings - the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case

shall likely have substantial impact upon the administration of criminal justice throughout California. The California Supreme Court in a number of decisions has rejected the position the *Middlebrooks* majority adopts in Part III of their opinion, i.e., that the same felony murder aggravating circumstance cannot be used to both (1) narrow the class of murderers (by a first degree murder verdict with a special circumstance finding in California) and (2) support the choice to impose the death penalty rather than the alternative of imprisonment. It is for this reason that the Committee seeks leave to file the attached *amicus curiae* brief herein.

Respectfully submitted,
on behalf of the

California District Attorneys Association, and the District Attorney of Los Angeles County

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I

THE HOLDING OF *STATE* v. *MIDDLEBROOKS*, 840 S.W. 2d 317 (TENN. 1992), IS BASED ON AN INAPPROPRIATE APPROACH TO THE ISSUE OF WHO RECEIVES THE PENALTY OF DEATH

A. The proper role of aggravating circumstances in death penalty jurisprudence

The issue presented by the instant case can only be properly understood by being put in the context of what an aggravating circumstance is constitutionally required to accomplish in a death penalty scheme. This Court has been particularly clear in a number of decisions as to what is and what is not required for an aggravating circumstance to meet the requirements of the Eighth Amendment. For example, the unanimous opinion in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853 (1988), in discussing an attack on a particular aggravating circumstance as vague, stated:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman.

Id., at 486 U.S. 361-362.

The same point is emphasized a little later in that same opinion:

> Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

Id., at 486 U.S. 362.

As *Maynard* points out, the same point had been made in the earlier case of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980). In holding an aggravating circumstance that a murder was "outrageously or wantonly vile, horrible and inhuman" too vague to serve its constitutional role, this Court in *Godfrey* reasoned:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed.

Id., at 446 U.S. 428-429.

Thus, this Court concluded in *Godfrey* that there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.*, at 446 U.S. 433.

Felony murder, with the elements of the underlying felony commonly spelled out in penal codes and jury instructions, is clearly not vague as an aggravating circumstance and thus does satisfy its role as a guide to the jury. This is obviously not what was of concern to the Tennessee Supreme Court in *State v. Middlebrooks*, 840 S.W. 2d 317 (Tenn. 1992). The question

then becomes why the Tennessee Supreme Court concludes the aggravating circumstance of felony murder was inadequate constitutionally. That court has phrased its concern in terms of narrowing, but it is clear that a felony murder special circumstance does "distinguish" (i.e., narrow), at least quantitatively, the class of murders in which the death penalty may be imposed from the cases in which it may not within the meaning of the above decisions. The nine crimes (or attempts to commit those crimes) which formed the basis of the felony murder aggravating circumstance in Tennessee clearly could not cover the majority of murders which occur in that state or any state. For purposes of imposing the death penalty, this class is further reduced to those first degree felony murderers who were major participants in the felony and showed a reckless indifference to human life, these being requirements which must be met under *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987), properly understood (see Section II *post.*).

B. Confusion of narrowing with proportionality[1] in *State v Middlebrooks*

It appears the real problem the majority of the Tennessee Supreme Court has with the death penalty system developed by the Tennessee legislature is not so much that it fails to satisfactorily limit the number of death eligible murderers but rather with who is included and who is excluded from the death eligible class. In other words, the *Middlebrooks* majority would exclude felony murderers unless there is an additional aggravating circumstance which would justify the death penalty in the sentencing phase. The decisions of this Court have clearly never so held, but the Tennessee Supreme Court nevertheless substantially relies on this Court's decisions, primarily *Zant* v. *Stephens*, 462 U.S. 862, 103 S.Ct. 2733 (1983), to do so. *Zant* is cited for the following propositions:

> A state, however, must not only genuinely narrow the class of death eligible defendants, but must do so in a way that reasonably justifies the

1. "Proportionality" is being used in the traditional sense of an abstract evaluation of the appropriateness of a sentence for a particular crime, judging the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes. This is distinct from "proportionality" as a comparison of the gravity of a murder in which a death penalty is imposed in a particular case with the gravity of offenses in similar cases. *Pulley v. Harris*, 465 U.S. 37, 42-43, 104 S.Ct. 871, 875-876 (1984), both makes this distinction and holds that the latter type of review is not invariably necessary to uphold a state death penalty system.

> imposition of a more severe sentence on the defendant compared to others found guilty of murder. . . . A proper narrowing device. . . must differentiate a death penalty case in an objective, evenhanded, and substantially rational way from the murder cases in which the death penalty may not be imposed.

State v. *Middlebrooks*, 849 S.W.2d 317, 343 (Tenn. 1992).

Yet, the *Zant* opinion only made these points in connection with the issue of vagueness. The actual quote from *Zant* which *Middlebrooks* paraphrases above begins with the phrase "[t]o avoid this constitutional flaw" and refers to the previous sentence where the flaw being discussed is the vagueness of standards. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The court then proceeded to discuss *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980), and its striking down of an aggravating circumstance that was so vague that it could be interpreted to include all murders. As discussed, *ante*, vagueness is not even arguably a problem with felony murder as a special circumstance.

Zant actually stands for the opposite of that for which the *Middlebrooks* majority attempts to use it in that *Zant* stresses that the circumstances of the crime *should be* considered in the sentencing phase and that narrowing is *not* the purpose at the sentencing phase. *Zant's* discussion of the constitutionality of the Georgia death penalty made a clear distinction between (1) the "aggravating circumstance" which narrowed the class of death eligible murderers and (2) the aggravating and mitigating circumstances which were to be weighed by the trier of fact to decide if death was the appropriate sentence for the particular death eligible defendant before the court. In making this distinction, the Court stated:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting from among that class, those defendants who will actually be sentenced to death.
>
> What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

Id., at 462 U.S. 878-879.

As to this second stage, the *Zant* opinion also characterizes its earlier decision in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2906 (1976), as approving "Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." *Id.*, at 462 U.S. 875.

Thus, after the class of murderers has been narrowed by the finding of at least one aggravating circumstance, it is clear that the function of aggravating circumstances is not to further narrow the class but rather to decide if the specific defendant before the court should receive the death penalty for which he has been determined eligible or whether he should be shown mercy due to the weighing of the aggravating and mitigating circumstances. Yet, the *Middlebrooks* majority confuses the purposes of the two stages and is analyzing the felony murder aggravating circumstance as a narrowing device where that aggravating circumstance would properly be used as part of the

individualized determination as to the culpability of the defendant. In essence, the *Middlebrooks* majority is saying that the circumstances of the crime itself cannot be considered in determining whether the individual defendant should receive the death penalty or not, which is preposterous. It is exactly the circumstances of the crime (combined with the character of the individual) that this Court has said repeatedly must be considered by the trier of fact in this stage of the proceedings. In addition to *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733 (1983), see *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976), *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 113-115, 102 S.Ct. 869, 876-877 (1982).

Yet, by excluding the fact of felony murder as an aggravating factor, the *Middlebrooks* majority is excluding consideration of the circumstances of the crime, or at least excluding it as an aggravating factor, thus distorting the entire purpose of the sentencing hearing. Thus, the majority in *Middlebrooks* is in fact saying that the death penalty for a felony murder is *disproportionate*. Justice Drowota's concurring and dissenting opinion in *Middlebrooks* also interprets the majority opinion as being essentially based upon proportionality analysis by noting the citation by the majority to *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (N.C. 1979). However, as discussed in the next section, the reasoning in the *Cherry* opinion is not consistent with this Court's opinions as to the proper approach to death penalty jurisprudence.

C. *State* v. *Middlebrooks* uses an improper mechanical approach to assess the role of aggravating circumstances in the sentencing decision

One additional source of authority is offered by the *Middlebrooks* opinion for the position that a felony murder aggravated circumstance cannot be used in Tennessee as a circumstance in support of the imposition of the death penalty. This authority is the North Carolina Supreme Court case of *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (N.C. 1979), which the majority opinion at one point quotes at length. The beginning of that quotation is particularly telling as to the thinking both of the North Carolina Supreme Court and the Tennessee Supreme Court:

> . . . A defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance "pending" [in the sentencing hearing] for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him.

State v. Cherry, 298 N.C. 86, 113, 257 S.E.2d 551, 568 (1979), quoted in *State v. Middlebrooks* 840 S.W.2d 317, 342. This quotation and the language that follows it show some confusion (by both state Supreme Courts) as to the nature of the constitutionally required determination between death and imprisonment. This approach of judging which sentencing decision is appropriate by counting how many "strikes" different situations would involve misses the point underlying the individualized sentencing required by this Court's decisions and "the fundamental respect for humanity underlying the Eight Amend-

ment." *Sumner v. Shuman*, 483 U.S. 66, 85, 107 S.Ct. 2716 (1989). As the California Supreme Court has stated in interpreting a death penalty statute then before it: "Nor would a statute pass muster if it required jurors to render a death verdict on the basis of some arithmetical formula, or if it forced them to impose death on any basis other than their own judgment that such a verdict was appropriate under all the facts and circumstances of the individual case." *People* v. *Brown*, 40 Cal.3d 512, 540, 709 P.2d 440, 455-456 (1985) (Footnote omitted), reversed on other grounds in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837 (1987). As the California Supreme Court went on to state:

> [W]ith respect to the process of selecting from among that class those defendants who will actually be sentenced to death, "[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." (Citation omitted.) It is not simply a finding of facts which resolves the penalty decision, "'but . . . the jury's moral assessment of those facts as they reflect on whether defendant should be put to death . . . .'" (Citation omitted.) The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty. (Fn. omitted.) Moreover, the decision is the responsibility of the jury and no one else. "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determin-

> ing the appropriateness of the defendant's death rests elsewhere." (Citation omitted.)

Id., at 40 Cal.3d 540, 709 P.2d 455.

The California Supreme Court in *People* v. *Brown*, 40 Cal.3d 512, fn.11, 709 P.2d 440 (1985), reversed on other grounds in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837 (1987), reached these conclusions after analyzing a number of decisions, including reasoning it found implicit in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976), and the concurring opinion of Justice Stevens in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418 (1983). In *Barclay*, Justice Stevens quoted approvingly the Florida Supreme Court's statement that "'. . . [T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present . . .'" (*Barclay*, 463 U.S. at p. 963). The California Supreme Court also cited several state court opinions, including a decision from the North Carolina Supreme Court, *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (N.C. 1983). In that case, the North Carolina Supreme Court stated that a sentencing jury in a death penalty case:

> must be satisfied that the sentence is justified and appropriate upon considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. . . .
>
> The jury is not required to assign a value to the aggravating circumstances, subtract from it the value of the mitigating circumstances, and look to the remainder to determine if that value is

> sufficiently substantial to deserve the death penalty. We reject and disapprove such a mechanical mathematical approach to the decision of life or death.

State v. McDougall, 308 N.C. 1, 32, 301 S.E.2d 308, 326, quoted in *People* v. *Brown*, 40 Cal.3d 512, 543 fn.14, 709 P.2d 440, 458 (1985), reversed on other grounds in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837 (1987).

Thus, the Tennessee Supreme Court, in relying on *Cherry's* mechanical approach and in choosing to not allow the felony murder to be considered as an aggravating circumstance in the sentence choice, is on shaky ground. Such a decision is clearly contrary to the better reasoned evaluations of the purpose of the sentencing hearing cited above.

Such an approach is also clearly not mandated by this Court and, because *Middlebrooks* states that the Eight Amendment demands such a rule, the conclusion in Part III of *Middlebrooks* is wrong and must be reversed. This very issue was presented in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988), where multiple homicides formed the basis of the first degree murder finding, making the death penalty an option as the appropriate sentence (i.e., narrowing the class of murderers) and also the basis of the sole finding of the sentencing hearing to survive the appellate process justifying a sentence of death rather then the alternative prison sentence. *Id.*, at 484 U.S. 243. This Court first dealt with the petitioner's attack on the "double use" of this factor and argument that his death sentence must be set aside by pointing out that this argument relied on "a mistaken premise as to the necessary role of aggravating circumstances." *Id.* at 484 U.S. 244. Later in the opinion, this Court clearly spelled out what this mistaken premise was:

Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." **The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.** There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

Id., 484 U.S. 246.

The Part III majority of *Middlebrooks* attempts to distinguish *Lowenfield* because of a difference in the sentencing structure between the Louisiana death penalty system and that of Tennessee. However, the distinction *Middlebrooks* draws makes no difference to the application of *Lowenfield* to the issue before it. *Middlebrooks* points out that the Louisiana statute narrowed the class of murderers by narrowly defining first degree murder and Tennessee does not. *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992). The real point, however, is that the class of murderers is narrowed in Tennessee by a jury finding of an aggravating circumstance. In both states, the issue then becomes can the jury use the same

factor to choose a death sentence. The fact that the class was narrowed in different ways does not effect this issue, and *Lowenfield* would apply in both situations.

The Supreme Court of California has cited *Lowenfield* for the proposition that "the 'triple use' of the same facts did not offend the cruel and unusual punishments clause." *People v. Marshall*, 50 Cal.3d 907, 945, 790 P.2d 676, 696-697 (1990). The explanation of what the California Supreme Court meant by "triple use" is contained in the following language:

> Defendant next claims the law is violative of principles established in the double jeopardy clause of the Fifth Amendment, the cruel and unusual punishments clause of the Eighth Amendment, and the due process clause of the Fourteenth Amendment because it allows the "triple use" of the same facts--i.e., to support (1) the conviction of first degree murder on a theory of felony murder, (2) the finding of the felony-murder special circumstance, and (3) the imposition of the penalty of death. But as defendant himself recognizes, the underpinnings of his argument have been removed by such decisions as *People* v. *Gates* (1987) 43 Cal.3d 1168, 1188, 240 Cal.Rptr. 666, 743 P.2d 301, and *People* v. *Anderson*, *supra*, 43 Cal.3d at page 1147, 240 Cal.Rptr. 585, 742 P.2d 1306.

Id., at 50 Cal.3d 945-946, see also *People v. Webster*, 54 Cal.3d 411, 456, 814 P.2d 1273, 1299 (1991).

Thus, California in a number of decisions has rejected the position the *Middlebrooks* majority in Part III adopts, i.e., that the same felony murder aggravating circumstance cannot be used both to narrow the class of murderers (the first degree

murder verdict with a special circumstance finding in California) and to support the choice to impose the death penalty rather than the alternative of imprisonment. In doing so, the California Supreme Court relied on *Lowenfield*, interpreting it as argued here since the California death penalty system is much more similar to the system of Tennessee than that of Louisiana.

D. Felony murder is a proper aggravating circumstance

Despite its contentions to the contrary, the Tennessee Supreme Court in the majority opinion in Part III of *Middlebrooks* was judging the proportionality of the death penalty for felony murder and found the death penalty disproportionate. Its holding requires a jury to find a felony murder plus another aggravating circumstance. Although the majority purports to reach this result by narrowing analysis (see discussion in Section I B, *ante*), Justice Drowota's concurring and dissenting opinion is more accurate in describing the analysis of the majority as based on a concern for a perceived disproportionality in allowing capital punishment for felony murder. Justice Drowota reaches this conclusion in part from the majority's reliance on quoted language from *State v. Cherry*, 308 N.C. 1, 257 S.E. 2d 551 (N.C. 1979), which at one point explicitly adopts proportionality analysis. The following language from *Cherry* quoted in *Middlebrooks* reflects this analysis:

> We are of the opinion that, nothing else appearing, the possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to the "automatic"

> aggravating circumstance dealing with the underlying felony.

State v. Cherry, 298 N.C. 86, 113, 257 S.E. 2d 551, 568 (1979), quoted in *State v. Middlebrooks* 840 S.W.2d 317, 342. Despite quoting this language, the *Middlebrooks* majority proceeds directly to an analysis of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733 (1983) as a narrowing case, returning eventually to proportionality analysis under the guise of narrowing "in a way that reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *State v. Middlebrooks*, 840 S.W.2d 317, 343. As discussed, *ante*, in Section I B of this brief, this analysis involves a misreading of *Zant*.

Since the underlying thrust of Part III of the majority opinion is thus a certain hostility to the felony murder doctrine in relation to the death penalty, it is important to note that this antagonism can not be said to be shared by the community as a whole. Although the felony murder rule both as a general doctrine and as a basis for capital punishment has been criticized by several academic commentators, neither the legislative branches of this nation nor the courts as a whole have shared this hostility. As David Crump and Susan Waite Crump in *In Defense of the Felony Murder Doctrine*, 8 HARV.J.L. & PUB.POL'Y 359 (1985), pointed out in discussing the "widespread acceptance" of the felony murder doctrine,

> Scholarly denunciation has had little effect upon its retention. Few legislatures have repealed the doctrine, and the courts, although correctly concerned about its proper limitation, have generally continued to enforce it.

Id. at 359-360 (footnotes omitted).

Ironically, Part II of the majority opinion of *Middlebrooks*, by the same author as Part III of *Middlebrooks* (but with a different majority from Part II), makes the same point. In its analysis of the enactments of state legislatures, including the modification of the death penalty system by the Tennessee General Assembly in 1989, as well as jury verdicts and court decisions, the majority opinion in Part II reaches the same conclusion as the authors of "In Defense of the Felony Murder Doctrine," also pointing out that thirty-two of the thirty-six states with the death penalty allow that punishment for felony murder.

Similar points are made in the opinions of the members of this Court. For example, Justice O'Connor in her dissent in *Enmund* concludes at one point that:

> In sum, the petitioner and the Court have failed to show that contemporary standards, as reflected in both jury determinations and legislative enactments, preclude imposition of the death penalty for accomplice felony murder.

Enmund v. Florida (1982) 458 U.S. 782, 826, 102 S.Ct 3368, 3391 (1982).

The rationale for the general acceptance of the doctrine of felony murder and its appropriateness as a basis for the death penalty is related by some of these same sources. For example, the article "In Defense of the Felony Murder Doctrine" suggests the discrepancy between scholarly criticisms and the general acceptance of the felony murder doctrine is due to the artificially logical or consistent theory holding mens rea to be the only legitimate determinant of the grade of a homicide, thereby neglecting the doctrine's relationship to proportionality and the results of the defendant's conduct. However, the general public is

> "particularly fearful of being victimized by strangers." BUREAU OF JUSTICE STATISTICS REPORT, *supra*, note 18, at 15 (reporting results of National Crime Survey). They "worry most about being injured by strangers." Furthermore, "[m]ost violent crimes except murder are committed by strangers" Id. These finding are consistent with the finding that certain ostensible felony murders were ranked as more serious than certain express-malice family killings. The conclusion follows from these data that the felony murder rule targets for severe treatment precisely those homicides that the population regards as most serious--a result in keeping with the principle of proportionality.

Crump & Crump, 8 HARV.J.L. & PUB.POL'Y 359 at 366-367, footnote 31, (1985)

Similarly, Justice O'Connor in a portion of her majority opinion in *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987), quoted by the majority in Part II of *State v. Middlebrooks*, identifies the following rationale for treating certain felony murders more seriously than certain premeditated murder:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all -- the person who tortures another, not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human

> life may be every bit as shocking to the moral sense as an intent to kill.

Tison v. Arizona, 481 U.S. 137, 157, quoted by *State v. Middlebrooks*, 840 S.W. 2d 317, 339 (emphasis omitted).

Earlier in *Tison* the Court had pointed out that:

> Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; . . . .

Tison v. Arizona, 481 U.S. 137, 140.

Based in part on this reasoning, this Court has in fact in *Tison*, answered the proportionality issue with which the Part III majority of *Middlebrooks* is struggling. This answer, however, is the very opposite of what Part III of *Middlebrooks* holds, as will be discussed in the next sections.

II

THE OPINION IN *STATE v. MIDDLEBROOKS*, 840 S.W.2d 317 (TENN. 1992), DUE TO ITS MISUNDERSTANDING AND MISAPPLICATION OF *ENMUND v. FLORIDA*, 458 U.S. 782, 102 S.Ct. 3368 (1982) AND *TISON v. ARIZONA*, 481 U.S. 137, 107 S.Ct. 1676 (1987), CREATES AN UNNECESSARY AND UNWISE EXTRA STEP TO THE DEATH PENALTY PROCESS

A. The Holdings of *Enmund v. Florida* and *Tison v. Arizona* and their effect on narrowing

If one agrees with this Brief's above analysis of the decision in *State v. Middlebrooks*, this Court in *Tison* has already dealt with the essence of the real question at issue in

the instant case and reached the opposite conclusion from the Tennessee Supreme Court. The question presented in *Tison* was whether the participation by the defendants in events leading up to the murder of four members of a family was sufficient to make the death penalty constitutionally permissible "although neither petitioner specifically intended to kill the victims and neither inflicted the fatal gunshot wounds." *Tison v. Arizona*, 451 U.S. 137, 138. *Tison*, of course, followed this Court's decision in *Enmund*. *Tison* characterized *Enmund* as holding defendant Enmund's death sentence disproportional under the Eighth Amendment because Enmund was a "minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state." Id. at 481 U.S. 149. However, *Tison* also characterized *Enmund* as clearly holding that jurisdictions that limited the death penalty to situations where the felony murderer actually killed, attempted to kill, or intended to kill could continue to exact the death penalty where the circumstances warranted it. *Id.*, at 150.

In light of its analysis of *Enmund*, the *Tison* opinion restates the issue as "whether the Eighth Amendment prohibits the death penalty in the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." *Id.*, at 481 U.S. 152. This question the majority opinion answers in the affirmative.

B. The opinion in *State v. Middlebrooks* misapplies *Tison v. Arizona* and *Enmund v. Florida*

The Tennessee Supreme Court characterized the effect of *Tison* as follows:

> Furthermore, the Supreme Court case of *Tison v. Arizona* now places a nationwide

> threshold of culpability at the reckless indifference level, meaning that a defendant who acts without reckless indifference is not constitutionally eligible for the death penalty. Therefore, since the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully further narrow the class of death-eligible defendants.

State v. Middlebrooks, 840 S.W.2d 317, 345 (Tenn. 1992); citations omitted.

The mistake of the Tennessee Supreme Court is to posit a necessity under the Eighth Amendment to "further narrow" the class of death-eligible defendants. The requirement under this Court's decisions is that the class of murderers as a whole must be narrowed. Thus, in *Zant v. Stephens*, 462 U.S. 862, 879 this Court stated: "These two findings [of aggravating circumstances] adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed."

The analysis by the Tennessee Supreme Court quoted above would only be correct if the class created by the application of *Enmund* and *Tison* to felony murderers was too large a class. This Court has never so held. The fact is that *Tison* sufficiently narrows the class of all murder cases by its requirements of "major participation in the felony committed, combined with reckless indifference to human life." Although *Tison* was concerned directly only with proportionality, this narrowing aspect of the decision cannot be overlooked. The Tennessee Supreme Court in *Middlebrooks*, however, does overlook this aspect and instead incorrectly adds a requirement of further narrowing.

C. The importance of the difference for death penalty jurisprudence

Thus, *State* v. *Middlebrooks* adds an unnecessary step to the required Eighth Amendment mandates as expressed in this Court's death penalty jurisprudence and believes it is required to do so by those very same precedents from this Court. As discussed in Part I, *ante*, this extra step unwisely forecloses the jury from considering the circumstances of the crime in a significant number of cases, i.e., all those where felony murder is the basis for the defendant being eligible for the death penalty.

III

APPLICATION OF THE CORRECT AND APPROPRIATE CONSTITUTIONAL PRINCIPLES TO THE FACTS OF *STATE v. MIDDLEBROOKS* REQUIRES REVERSAL OF THE HOLDING OF *STATE v. MIDDLEBROOKS*, 840 S.W. 2d 317 (Tenn. 1992)

A. Defendant Middlebrooks was sufficiently involved in the underlying felony

Applying the correct Constitutional principles to the facts of *State v. Middlebrooks*, it is clear that the death penalty was appropriately chosen as the appropriate sentence for defendant Middlebrooks. The first question to be analyzed under the correct principles is defendant Middlebrooks' involvement in the crime leading to the death of the victim.

The facts, as related in the majority opinion of *Middlebrooks*, show that the involvement of defendant Middlebrooks in the underlying felony, kidnapping, was major.

Witnesses saw Middlebrooks and his co-defendant, Brewington, chase the victim and his friends until they caught the victim. While Brewington held the victim around his neck and head, Middlebrooks held the victim's hand. Both defendants dragged the victim to another location, at which time Middlebrooks struck the victim in the face, knocking him to the ground. In Middlebrooks' video-taped statement, he admitted only minor participation in the later beating and tortuous mistreatment of the victim and instead depicted Brewington as the main perpetrator of the offense. He stated that the abuse of the victim was done by Brewington, himself and his wife while all were present, but admitted only striking the victim with his open hand and on the leg with a switch during the torture other than stabbing the victim once after Brewington had stabbed him. Middlebrooks, however, had made a previous statement in which he had admitted stabbing the victim twice. (*State v. Middlebrooks*, 840 S.W.2d 317, 324.)

The jury convicted Middlebrooks of first-degree murder in the perpetration of a felony and of aggravated kidnapping. The sentencing phase included the incorporation of the guilt-phase evidence; the jury found the existence of the two aggravating circumstances, basically torture and that the murder was committed while the defendant was engaged in committing a felony, and sentenced the defendant to death. (*Id.*, at 840 S.W.2d 325-326.)

As in *Tison*, defendant Middlebrooks' "participation in the crime was anything but minor" in that he fully participated in the felony, placed the victim in a position to be killed, and watched the killing. *Tison v. Arizona*, 481 U.S. 137, 152-153. Actually, Middlebrooks' participation in the instant killing was greater than that of the defendants in *Tison* in that Middlebrooks actually stabbed the victim whereas in *Tison* the

defendants had not delivered any direct injury to the victim. *Tison v. Arizona*, 481 U.S. 137, 141. It also appears from the recitation of facts in *Middlebrooks* that Middlebrooks very well could have delivered the fatal stab wound, either under his second statement that he inflicted only one of the stab wounds or his earlier statement that he had inflicted both of them. *State v. Middlebrooks*, 840 S.W.2d 317, 324.

B. Defendant Middlebrooks had the required state of mind towards human life

The second question that must be answered to support the death penalty in this case is the state of mind of Middlebrooks in relation to the death of the victim.

The jury acquitted the defendant of premeditated first-degree murder. Nevertheless, Middlebrooks, in his second statement, gave as his reasons for stabbing the victim "'to prove to Roger that I guess I was cooler' and to put Majors out of his misery." The expert testimony showed that the victim's ordeal lasted several hours, that various acts of torture had occurred during that time, and that there were two deep stab wounds, one of which caused the victim to bleed to death over a period of ten to thirty minutes, during part of which the victim was conscious. *Id.*, at 840 S.W.2d 317, 324-325.

This evidence in the context of the complete facts of the case as spelled out in the majority opinion of *Middlebrooks* clearly supports, as in *Tison*, the view that Middlebrooks "subjectively appreciated that [his] acts were likely to result in the taking of innocent life." *Tison v. Arizona*, 481 U.S. 137, 152.

C. The jury in this case had opportunity to show mercy

The third and final question that must be answered to uphold the death penalty in this case is whether the defendant had the opportunity to present to the sentencing jury all mitigating circumstances. See *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976), *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 113-115, 102 S.Ct. 869, 876-877 (1982). The defendant did in fact present mitigating evidence at the sentencing hearing and the jury found that the aggravating circumstances outweighed the mitigating circumstances and sentenced the defendant to death. *State v. Middlebrooks*, 840 S.W.2d 317, 325-326. There is apparently no contention that he did not have a complete opportunity to present all mitigating evidence or that it was limited in any fashion. Instead, as argued above, the Tennessee Supreme Court mistakenly directed its attention to a non-existent requirement regarding aggravating circumstances. The Eighth Amendment of the United States Constitution does not require more of an aggravating circumstance than that it properly narrow the class of murderers to those for whom the death penalty is appropriate. The holding of the Tennessee Supreme Court to the contrary must therefore be reversed.

CONCLUSION

In conclusion, and for the reasons set forth above, this Court should reverse the ruling of the Tennessee Supreme Court and should hold that the sentence to death of the defendant is not precluded by the Eighth Amendment to the United States Constitution.

Respectfully submitted on behalf of the
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